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Ernest E. Blake v. Hubert C. Lambert : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ERNEST E. BLAKE, Plaintiff-Appellant,	)	
v.	)	Case No. 15668
HUBERT C. LAMBERT, STATE ENGINEER, Defendant-Respondent.	)	

BRIEF OF RESPONDENT

ON APPEAL FROM THE JUDGMENT AND DECREE
IN FAVOR OF DEFENDANT-RESPONDENT
OF THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, UTAH

HONORABLE GEORGE E. BALLIF, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

ERNEST E. BLAKE, Plaintiff-Appellant, v. HUBERT C. LAMBERT, STATE ENGINEER, Defendant-Respondent.	)	Case No. 15668

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This action was initiated pursuant to the provisions of Section 73-3-14, Utah Code Annotated 1953, as amended, to review a decision of the State Engineer denying Appellant further extension of time to complete his appropriation of water under Applications Nos. 33554, 35444 and 36570, and lapsing these Applications. Appellant is seeking a reinstatement of said Applications and a further extension of time for each Application.

DISPOSITION IN THE LOWER COURT

The Trial Court ruled that Appellant had failed to show due diligence or reasonable cause for delay in completing his appropriation of water under Applications Nos. 33554, 35444 and 36570, and therefore was not entitled to further extensions of time. The Court upheld the decision of the State Engineer denying Appellant's request for additional time and lapsing these Applications.

RELIEF SOUGHT ON APPEAL

Respondent submits that the decision of the Trial Court was correct and proper in all respects and should be affirmed.

STATEMENT OF FACTS

Respondent agrees with most of the facts set forth in Appellant's Brief concerning Applications Nos. 33554, 35444, and 36570, but disagrees with some of the conclusions made therein. Further, there are certain additional facts that Appellant has omitted which are relevant to the Court's consideration of this matter. It is believed that the following summary of each of the three Applications involved in this appeal will be helpful in evaluating the legal arguments which follow.

By way of introduction, it should be pointed out that when an application to appropriate water is approved, the applicant is given a specific time within which to place the water to beneficial use and submit proof of appropriation (§73-3-10, Utah Code Annotated 1953, as amended). At this point, the applicant may submit his proof of appropriation if he has completed his project, or he may request an extension of time within which to do so. All requests for extensions of time must be by affidavit (§73-3-12, Utah Code Annotated 1953, as amended), and the State Engineer—upon a proper showing of diligence in completing the project or a reasonable cause for delay—may grant the applicant an extension of time. Thus, it is these extension requests that contain the basic evidence from which it must be

determined whether the applicant has been diligent. These requests are contained on Appellant's three Application files. On the front of each file is a chronological summary showing the dates of the various extensions granted by the State Engineer and the requests for further extension extracted from Appellant's extension requests. The documents described on the summary sheets are contained within the Application files, and are tabbed with numbers corresponding to the number given each document listed on the summary sheets. For example, on Application No. 35444 (Ex. 3), Appellant's third extension request is identified and summarized as Item No. 4, with tab number 4 being attached to the extension request itself.

Appellant's Applications can be summarized as follows:

No. 1: Application No. 36570 (Ex. 2) — This Application sought to appropriate 3 c.f.s. of water for irrigation, domestic and stockwatering purposes by means of drains located in Wide Canyon, Washington County. This Application was approved by the State Engineer on July 11, 1966. Appellant requested (Ex. 2, Tabs 1, 2, 4 & 6) and received four separate extensions of time to complete this project covering a period of approximately 6½ years (Ex. 2, Tabs 1, 3, 5 & 7). Appellant's final extension request stated that in excess of $200.00 worth of development work had been done on the project, and estimated that it would cost about $1,500.00 to complete the project (Ex. 2, Tab 7). However, this $200.00 had been expended during prior extension periods (Ex. 2, Tab 2). Reasons given for requesting further extension were that

Appellant had been involved in a drawn-out divorce and had been prevented from completing his project because of conditions prescribed by the Bureau of Land Management and the State Engineer. On January 12, 1973, the State Engineer denied Appellant any further extension of time and lapsed this Application.

No. 2: Application No. 35444 (Ex. 3) — This Application sought to appropriate .50 c.f.s. of water for domestic, stockwatering, and irrigation purposes from Rock Hollow Wash in Washington County. This Application was approved by the State Engineer on February 11, 1965 (Ex. 3, Tab 1). Appellant requested (Ex. 3, Tabs 1, 2, 4 & 6) and received four separate extensions of time covering a period of approximately eight years (Ex. 3, Tabs 1, 3, 5 & 7). Appellant's last extension request stated that about $400.00 worth of development work had been done on this project to install a collection box, some drain tile and plastic pipe, but that Appellant had not been able to complete the project because of a drawn-out divorce action and conditions prescribed by the Bureau of Land Management and the State Engineer (Ex. 3, Tab 8). However, the work accomplished had been done under earlier extension requests (Ex. 3, Tabs 2 and 4). The State Engineer, by Memorandum Decision dated January 12, 1973, denied Appellant any further extension of time and lapsed this Application.

No. 3: Application No. 33554 (Ex. 4) — This Application sought to appropriate 1 c.f.s. of water for irrigation and stockwatering purposes from certain open cuts located in Section 35, Township 40 South, Range 16 West, SLB&M, in Washington County. This Application was approved on November 23, 1962 (Ex. 4, Tab 1). Appellant requested (Ex. 4, Tabs 1, 2, 5 & 7) and received five separate

extensions of time covering a period of approximately ten years (Ex. 4, Tabs 1, 3, 4, 6 & 9). Appellant's final extension request stated that caterpillar, other machine, and well development work had been done at a cost in excess of $2,100.00, and that the estimated cost of completing the project was $3,800.00. Reasons given for not completing the project were the same as for the other two Applications. It must be noted, however, that the bulk of Appellant's $2,100.00 expenditure was for the drilling of a well which he had begun some years earlier (Ex. 4, Tab 5) and which was not covered by this Application (T. 37-39; Ex. 4, Tabs 8-A through -D). The Trial Court concluded that funds expended outside the scope of Appellant's project could not be considered in the evaluation of Appellant's diligence in completing his approved project (R. 40, 44).

The foregoing is a brief summary of the history and development of Appellant's three Applications, as summarized from Appellant's Affidavits and the State Engineer's files. Appellant testified that all of his costs and some of the work he had done himself were not reflected in his extension requests (T. 24, 26).

An additional factual matter—and one of primary importance in evaluating Appellant's extension requests—is that Appellant never obtained the rights-of-way from the Bureau of Land Management necessary to develop the water sources involved in these three Applications and to convey the water to its place of use (R. 33; T. 40-42). Further, in the Pre-Trial Order it was stipulated that Appellant was not the owner nor in possession of the land where the water was proposed to be used under said

Applications (R. 33).

There are unapproved applications located in the general vicinity of Appellant's Applications. Appellant has three unapproved applications by which he seeks to appropriate a total of 31 c.f.s. of water (Exs. 5, 6 & 7). There are also other individuals in this same situation. Exhibit No. 8 contains four separate unapproved applications by other individuals seeking to appropriate water in this area. The State Engineer testified that a question exists as to whether there is unappropriated water in this vicinity, and that part of this uncertainty is not knowing whether Appellant would ever perfect the three Applications which are the subject of this appeal (T. 55-58). These other applicants are anxious to have an opportunity to proceed with their applications (T. 58).

Respondent will reply to the points raised in Appellant's Brief in the order in which they are set forth therein.

ARGUMENT

POINT I

APPELLANT FAILED TO SHOW DUE DILIGENCE OR REASONABLE CAUSE FOR DELAY IN PERFECTING APPLICATIONS NOS. 33554, 35444 AND 36570, AND THE TRIAL COURT PROPERLY CONCLUDED THAT APPELLANT HAD NOT COMPLIED WITH THE PROVISIONS OF SECTION 73-3-12, UTAH CODE ANNOTATED 1953, AS AMENDED.

A. Purpose of and Need for Due Diligence Requirements

The requirement that an appropriator of water proceed with due diligence or show reasonable cause for delay in perfect-

ing his appropriation is one of the fundamental principles of the appropriation doctrine. Even before the Western States adopted their water codes, various courts had ruled that in order for an appropriator to perfect a water right and maintain a priority date relating back to when his appropriation was initiated, he must proceed with due and reasonable diligence to place the water to beneficial use (Nevada County & Sacramento Canal Co. v. Kidd, 37 Cal. 282 (1869); Clough v. Wing, 2 Ariz. 371, 17 Pac. 453 (1888)). This concept was bottomed on the sound and practical premise that development and utilization of the very limited water resources was so critical to the development of other resources and the overall public interest that no one should be entitled to tie up water for an extensive period of time without placing it to a beneficial use. In other words, if a proposed appropriator was unable to develop this public resource within a reasonable time, others should be given the opportunity to do so. This requirement was sound when it was adopted, and is even more relevant today with the tremendous demands that are being placed on our limited unappropriated water. This Court recognized this principle in the case of Carbon Canal Co. v. Sanpete Water Users Assoc., 19 Ut.2d 6, 425 P.2d 405 (1967). At page 9 of the Utah Reporter it is stated:

> Sanpete's successful extensions for decades leaving but few years to go, impel this court, in a conceded equity case, to canvass the facts to determine if,

> in this arid state, where a drop of water is a drop of gold, one, by extension after extension, may equitably prevent beneficial use of water by others through procedural stagnation for about forty years. We think not, ...

Appellant has been given more than ample time to utilize this public resource, and other potential appropriators are anxiously awaiting an opportunity to develop the limited water supply in this area (Ex. 8; T. 58).

B. Section 73-3-12 and the Test for Determining Diligence

As the various States adopted their water codes, the due diligence requirement in perfecting approved applications formed a part of the states' statutory water law. In Utah, this requirement is found in Section 73-3-12, Utah Code Annotated 1953, as amended. Once the State Engineer determines that an application should be approved under the provisions of Section 73-3-8, Utah Code Annotated 1953, as amended, the applicant is given a specific time within which to construct his project, place the water to beneficial use and submit proof of appropriation (§73-3-10, supra). An applicant's time for accomplishing this can be extended under the provisions of §73-3-12 upon a proper showing of diligence or reasonable cause for delay.[1/]

1. Since an amendment to this Section in 1975, an applicant has the responsibility of affirmatively showing that he has exercised or is exercising reasonable and due diligence toward the completion of his appropriation, and extensions granted by the State Engineer shall be effective so long as the applicant shall continue to exercise reasonable diligence in completing his project (Section 73-3-12, Utah Code Annotated 1953, as amended).

This Court has ruled that the determination of diligence or reasonable cause for delay for an approved application under §73-3-12 is essentially a question of fact. This test was announced in the first Carbon Canal Co. v. Sanpete Water Users Assoc. case, 10 Ut.2d 376, 353 P.2d 916 (1960):

> Whether due diligence has been used or there has been reasonable delay in commencing the construction of works to appropriate water under an application is a question of fact to be determined from all the circumstances surrounding each particular case. What acts might reasonably be found to be due diligence under one set of circumstances might not under other conditions. The real criterion appears to be the bona fides of the attempt to appropriate which might be pursued with all the expedition and constant effort to accomplish the undertaking which is usual "in men engaged in like enterprises, and who desire a speedy accomplishment of their designs" (10 Ut.2d at 378).

This test was amplified in the second Carbon Canal Co. v. Sanpete Water Users Assoc. case, 19 Ut.2d 6, 425 P.2d 405 (1967), wherein it was stated that neither lack of funds to complete the project nor ill health would dispense with the necessity of actually placing the water to beneficial use within a reasonable time. Because of the importance of water development in this State, the Court further pointed out that the applicant has a substantial burden of demonstrating facts which would justify a further extension of time:

> We think the evidence presented in either or both of the cases compels us to resolve the doubt in favor of due diligence in expeditious development of water, and not in favor of the delay reflected in the facts developed, most of which were inadmissible, having occurred after the extension had

> expired. In the light of this principle, we hold that the applicant proved neither the required diligence nor a reasonable excuse for delay by that high type of convincing evidence demanded in water development cases (19 Ut.2d at 8) (Emphasis Added).

Later, in the same opinion, the Court noted that the applicant had not sustained its burden of showing that it was entitled to a further extension of time " . . . by that high degree of quantitative and qualitative proof necessary in cases having to do with such water rights" (19 Ut.2d at 9).

Since the facts are so important in determining whether an applicant is entitled to a further extension of time, it is now time to look at the facts upon which Appellant relies and see if he has met his burden with the "high degree" of proof required in extension cases.

C. The Facts of this Case Fall Short of Showing that Appellant is Entitled to Additional Time

The evidence in this case, which fully supports the Findings and Decree of the Trial Court, overwhelmingly shows that Appellant has not proceeded with due diligence or shown reasonable cause for delay on any of the three Applications involved in this appeal.

1. Development Cannot be Made under Existing Conditions

One of Appellant's primary reasons for claiming that he is entitled to further extensions of time on these three Applications is because of his inability to secure the necessary rights-of-way from the Bureau of Land Management to

develop the water sources involved. In order to secure water at the points of diversion covered by the three subject Applications and transport that water to the place where Appellant intends to use it, it is necessary to secure rights-of-way from the Bureau of Land Management. Appellant's inability to secure these rights-of-way has existed ever since these Applications were approved (Exs. 2, 3 & 4) and, while Appellant has made certain efforts to secure these rights-of-way, the fact is he has been unable to do so (R. 33), and has no present prospect for obtaining such rights-of-way (T. 40-42). In other words, Appellant was no closer to solving this problem when his last extension request was denied that he was when the Applications were approved. Applicant has had a substantial amount of time to solve this problem, but has made no appreciable progress toward solving it (Appellant did secure a special land use permit for a one-year period in 1969, but this was for a well site which was not covered by any of Appellant's three Applications (Ex. 11)). Without these rights-of-way, Appellant will never be able to perfect these Applications. While an applicant should be given a reasonable time to secure the easements necessary to develop his project, such delays should not be allowed to tie up a water source for an extended period of time. This is particularly true where other applicants are waiting for an opportunity to use the available water supply.

Not only is Appellant without the rights-of-way necessary

for his project, but at the time of the Pre-Trial of this matter, Appellant had lost whatever interest he may have had in the land where he proposes to use the water. In the Pre-Trial Order entered on June 13, 1977, it was stipulated by the parties that:

> The Plaintiff [Appellant] is not the owner of record, nor is he in possession of any leases or rights-of-way which give him possession or control of the land where the various points of diversion are located or where the water is to be used under said Applications.

Following the Pre-Trial, Appellant did secure two leases for property in this area. However, the one lease—which is for a five-year period—does not cover the place of use described in any of the three subject Applications (Ex. 14). The second lease (for only ten acres of land) is only for a period of one year with an option to purchase (Ex. 13). However, both of these documents are irrelevant to Appellant's last extension request (which expired on November 30, 1972), and were objected to on that basis (T. 79). This Court concluded in the second Carbon Canal Co. case that efforts made or work done after the expiration of an extension period were immaterial (19 Ut.2d at 11). This was the view of the Trial Court (T. 10). These documents were admitted simply to show what had transpired after the Pre-Trial Order had been entered (T. 77), but not to show diligence during the relevant period of time (T. 77).

2. Appellant's Domestic Problems are not a Basis for Further Extensions

Appellant's other reason given in his last extension request to the State Engineer was that he had been involved in

a long, drawn-out divorce action. This, of course, could have no direct bearing on his inability to secure the necessary rights-of-way from the Bureau of Land Management. Appellant did not state in his extension request how this divorce action prevented his completing the development of these Applications, and did not amplify this matter to any degree in his testimony at the Trial. The great bulk of his testimony centered around his problems with the Bureau of Land Management. It appears that his domestic difficulties contributed to problems with his nerves (T. 27), and presumably the divorce action placed an additional financial strain on him. However, as pointed out by this Court, health and financial problems will not serve as a basis for continued extensions of time (Carbon Canal Co. v. Sanpete Water Users Assoc., 19 Ut.2d at 12). Also, see Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534 (1869), and Maricopa County Municipal Water Conservancy Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 360 (1931). From Appellant's failure to clarify how his divorce problems prevented the development of his Applications, it can only be assumed that this matter was secondary to his problems with the Bureau of Land Management.

3. An Extension Cannot be Justified on Appellant's Past Expenditures

Appellant has only made a very modest investment in the subject Applications over a substantial period of time, and his expenditures on these Applications do not justify any

further extension of time. This is clearly demonstrated by Appellant's own sworn extension requests:

(1) Application No. 36570 — Appellant was granted four separate extension requests on this Application, covering a period of time from July 11, 1966 (when the Application was approved) to November 30, 1972 (when the last extension period expired). This is a period of approximately six and one-half years. Appellant's last extension request recites that approximately $200.00 had been spent on development work and that the estimated cost of completing the project would be $1,500.00. Thus, according to Appellant, the total cost of the project would be $1,700.00. During the 6½ years this Application was approved, Appellant completed approximately one-eighth of the work on the project for an average expenditure of less than $33.00 per year. At that rate, another 45 years would be required to complete the project! Further, the $200.00 was spent during an earlier extension period (Ex. 2, Tab 2), and there is no evidence that Appellant expended any additional funds during the period prior to the denial of further extension of time. It is extremely difficult to see how Appellant believes these facts justify any further extension of time for this Application.

(2) Application No. 35444 — Appellant was also granted four separate extensions of time on this filing. This Application was approved on February 11, 1965, and the last ex-

tension expired November 30, 1972. This covers a period just short of eight years. Appellant's last extension request (Ex. 3, Tab 8) states that $400.00 worth of work had been done on the project. Thus, during a period of approximately eight years, Appellant spent $400.00, for an average of approximately $50.00 per year. Further, from a description of the work done, it seems clear that these funds were expended during prior extension periods (Ex. 3, compare Tabs 2 & 3 with Tab 8). The expenditure of an average of $50.00 a year—with no expenditure at all during the final extension period—cannot serve as justification for a further extension of time.

(3) Application No. 33554 — This Application was approved November 23, 1962, and Appellant has since been granted five extensions covering a period of approximately ten years. Appellant's latest extension request states that approximately $2,100.00 had been expended (Ex. 4, Tab 10), although part of this appears to have been expended during prior extension periods (Ex. 4, Tab 5). At the Trial, Appellant estimated he had spent more than the $2,100.00 on this well development (T. 20-21). However, the relevant point to be made here is that the bulk of this money was spent for the drilling of a well which was outside the scope of this project (T. 35-39). The Trial Court correctly ruled (R. 49) that funds spent outside the scope of the project covered by Appellant's approved Application could not be considered in evaluating past diligence, and Appellant

has not disputed this. This leaves Appellant with an extremely modest financial showing for an Application approved for a decade.

At the Trial, Appellant estimated his total investment in these three Applications as somewhat higher than shown on his extension requests (T. 20-21), but—as pointed out above—the bulk of these additional funds were spent on a well which was outside the scope of Appellant's approved Applications (T. 35-38). Also, Appellant's estimate included money spent on attorney's fees relating to his trespass problems with the Bureau of Land Management, and Appellant concedes that this expenditure should not be included in the funds expended on these Applications (T. 43-44). Further, Appellant conceded on cross-examination that in terms of dollars spent, the $200.00 on Application No. 36570 and the $400.00 on Application No. 35444 were accurate figures (T. 41-42).

The money spent on diversion works authorized by these Applications shows an extremely modest investment by Appellant to tie up a total of 4.5 c.f.s. of water for such an extended period of time. Certainly this investment falls far short of demonstrating due diligence or reasonable cause for delay by the " . . . high type of convincing evidence demanded in water development cases" (Carbon Canal Co. v. Sanpete Water Users Assoc., 19 Ut.2d at 8.

4. Appellant has not Met the Standard Required for Projects of this Nature

On page 11 of his Brief, Appellant asserts that the State Engineer is exacting too much diligence from applicants. This is not true, but it is true that the State Engineer is requiring relatively small projects such as this to be completed without undue delay. This is proper with the ever-increasing demands for the available water supply in this State; and particularly so where other potential applicants are awaiting an opportunity to develop the water. Appellant complains that the State Engineer is too harsh in his requirement that no more time be allowed for these Applications, and that the State Engineer has no uniform standard for evaluating extension requests. This is not so. The State Engineer testified at length that nothing is being required of Appellant that is not required of other applicants with similar projects, and that a uniform policy exists for all applications of this nature (T. 47-54). The plain fact is that Appellant is no closer to solving his right-of-way problems with the Bureau of Land Management today than he was on the day his Applications were approved, and his prior expenditures on these Applications does not justify further delay.

Appellant suggests that since Section 73-3-12 allows the State Engineer to grant extensions for up to fifty years, he should be more generous than he is on applications. Certainly there are a few situations which may justify this kind of time—

such as the multi-million-dollar Central Utah Project—but even then substantial progress on development must be shown. To allow small and relatively inexpensive projects to tie up water for an extended period of time without development would totally frustrate water development in this State and is clearly at odds with the due diligence mandate of Section 73-3-12.

POINT II

DENIAL OF ANY FURTHER EXTENSION OF TIME FOR APPELLANT'S THREE APPLICATIONS IS FULLY SUPPORTED BY THE FACTS, EVEN THOUGH THESE APPLICATIONS HAD NOT BEEN APPROVED FOR THE SAME PERIODS OF TIME

Appellant states under Point II of his Brief that it was improper for the State Engineer to consider all three Applications together and to lapse them at the same time. It was Appellant—and not the State Engineer—who tied the three Applications together. Throughout the period that Appellant was making his extension requests, his primary reason for seeking additional time to develop these Applications was his inability to obtain the necessary rights-of-way from the Bureau of Land Management. In his final extension request he used virtually identical language for each Application —his problems with the Bureau of Land Management and his drawn-out divorce action (Ex. 2, Tab 8; Ex. 3, Tab 8; Ex. 4, Tab 10). The State Engineer did evaluate each Application separately, but Appellant's reasons for requesting additional time were the same on each filing. Appellant then goes on to state that the shorter periods given on two of the three Applications—approximately eight years on

Application No. 35444 (Ex. 3) and six and one-half years on Application No. 36570 (Ex. 2)—were prejudicial to him. This is most difficult to understand. If Appellant was unable to solve his problems with the Bureau of Land Management in the ten-year period he had on Application No. 33554 (Ex. 4), there is certainly no basis to suggest that he could have done so on the other two Applications in the same amount of time, and Appellant has suggested none. Appellant goes on to make the erroneous argument that he was caught in a cross-fire between the Bureau of Land Management and the State Engineer because after the State Engineer denied further extensions of time the Bureau of Land Management would not grant him the rights-of-way. What Appellant fails to acknowledge is that the State Engineer had been extremely generous in granting prior extensions of time to give Appellant ample opportunity to solve his problems with the Bureau of Land Management. To now suggest that Appellant is being treated unfairly by the State Engineer because of his problems with the Bureau of Land Management is totally unfounded. The State Engineer went beyond his usual procedures on applications of this magnitude to give Appellant every opportunity to resolve his right-of-way problems (T. 54, 65). Further, the State Engineer advised Appellant of his growing concern over the lack of development under these Applications. On each of these three Applications, in granting the last extension, the State Engineer advised Appellant in his

Memorandum Decisions that in light of the past record further extensions would be critically reviewed, and unless the water had been utilized further extensions would be denied (Ex. 2, Tab 7; Ex. 3, Tab 7; Ex. 4, Tab 9). Appellant goes on to gratuitously state that his past performance—or lack of it—should not be used the judge what he can accomplish in the future. However, Appellant fails to point to any evidence or to develop any argument why this is so.

Appellant suggests that the Trial Court would have ruled differently if Appellant had some assurance that the right-of-way approval would be forthcoming in the future. Again, this is not so. The Trial Court, in accordance with the prior decision of this Court in the second Carbon Canal Co. case, supra, properly restricted the evidence and the evaluation of diligence or reasonable cause for delay to the extension period (T. 10). Further, Appellant can give no such assurances because the Bureau of Land Management has not indicated that he will ever get such rights-of-way.

Finally, thorughout his Brief, Appellant argues in broad generalities that the Findings of Fact of the Trial Court are erroneous and incorrect, but it is significant that Appellant has not pointed to any specific Finding which he believes to be improper, nor has he directed the Court's attention to any specific evidence in the record to support his argument. This is not surprising, since the Findings of the Trial Court are

fully supported by the evidence. This Court has repeatedly held that it will not disturb Findings of Fact of Trial Courts unless they are clearly erroneous and contrary to the weight of the evidence (Nunley v. Walker, 13 Ut.2d 105, 369 P.2d 117 (1962); Metropolitan Investment Co. v. Sine, 14 Ut.2d 36, 376 P.2d 940 (1962); McBride v. McBride, _____ P.2d _____ (June 8, 1978). Appellant has fallen woefully short of making any showing that the Findings in this case are not supported by the evidence.

The argument under Point III of Appellant's Brief is nothing more than an adoption of his arguments under Points I and II of his Brief. The arguments developed under these Points have been fully responded to above, and there is no need to repeat them under a separate Point.

CONCLUSION

In Utah, water has been declared by the Legislature to be public property (Section 73-1-1, Utah Code Annotated 1953, as amended). Rights to the use of this public resource can only be acquired as provided for in the water code, and the concept of due diligence in perfecting an approved application forms an integral part of Utah's basic water law. Appellant has been given more than ample opportunity to develop these three Applications, but is no closer to accomplishing this than when these Applications were approved. An applicant who has been unable to secure the necessary rights-of-way to utilize the water, is without an interest in the property where the water is to be

used, and has made only a modest investment in the development of his projects over a substantial number of years, has failed to demonstrate that he is entitled to any further extension of time by the high degree of proof required by this Court in water development cases. Others should have an opportunity to utilize this public resource.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Respondent were mailed to Joseph C. Fratto, Attorney for Plaintiff-Appellant herein, at 206 Metropolitan Law Building, 431 South Third East Street, Salt Lake City, Utah 84111, this 20th day of July, 1978.

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